STATE OF MICHIGAN

IN THE SUPREME COURT

MARK JAMES,

Plaintiff-Appellee,

and

AUTO-OWNERS INSURANCE COMPANY,

Intervening Plaintiff/Appellee,

vs

AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and FARMERS INSURANCE EXCHANGE,

Defendants-Appellants,

and

SECOND INJURY FUND/PERMANENT & TOTAL DISABILITY PROVISIONS,

Defendant-Appellee.

Supreme Court:

Court of Appeals: 257993

Lower Court: WCAC Docket No: 040002

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NOTICE OF HEARING

DEFENDANTS AUTO LAB DIAGNOSTICS AND FARMERS INSURANCE EXCHANGE'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this matter, pursuant to MCR 7.301(A)(2) and MCL 418.861a(14). This application is being filed within 42 days of the Court of Appeals' order denying leave to appeal, as required by MCR 7.302(C)(2).

STATEMENT OF QUESTIONS PRESENTED

I

DID THE WCAC IMPERMISSIBLY FIND PLAINTIFF'S ATTENDANCE AT THE SEMINAR TO BE AN INCIDENT OF HIS EMPLOYMENT, WHERE SAID ATTENDANCE WAS FOUND TO BE ENCOURAGED AT BEST, AND NOT REQUIRED OR EXPECTED?

Defendants-Appellants answer "YES."
The WCAC answered "No."
The Court of Appeals did not answer.

II

IF PLAINTIFF HAS SUFFERED A WORK-RELATED INJURY, SHOULD THIS COURT FURTHER EXPLORE DEFENDANT'S LIABILITY FOR AN ATTORNEY FEE ON MEDICAL EXPENSES, IN THAT THE WCAC FAILED TO CONSIDER OR RESOLVE ISSUES DULY RAISED BEFORE IT IN THAT REGARD?

Defendants-Appellants answer "YES."
The WCAC answered "No."
The Court of Appeals did not answer.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendants seek leave to appeal from the August 20, 2004 opinion of the WCAC, towards the end of the reversal of that opinion and the denial of benefits or, at the least, the reversal of the granting of an attorney fee on plaintiff's medical expenses.

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DEFENDANTS AUTO LAB DIAGNOSTICS AND FARMERS INSURANCE EXCHANGE'S APPLICATION FOR LEAVE TO APPEAL

NOW COMES Defendants-Appellants AUTO LAB DIAGNOSTICS and FARMERS INSURANCE EXCHANGE , by and through their attorneys, COUZENS, LANSKY, FEALK, ELLIS, ROEDER & LAZAR, P.C., and respectfully request that this Honorable Supreme Court grant their application for leave to appeal, stating as grounds the following:

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(The transcript of the proceedings below shall be referred to as follows:

"I"	May 19, 2003
"II"	June 6, 2003
"III"	June 16, 2003
"IV"	October 22, 2003

Numbers preceded by "B" refer to pages of the deposition of Brian Booher.)

The proceedings described below were initiated upon the filing by plaintiff Mark James of an application for mediation or hearing on or about April 2, 2002, claiming entitlement to workers' compensation benefits as the result of injuries he sustained in an automobile accident occurring on October 24, 2001. Intervening plaintiff Auto-Owners Insurance Company subsequently filed its own application on or around September 10, 2002, seeking reimbursement of no-fault payments they made to plaintiff.

Plaintiff was born on August 20, 1973 (I 8). He is a high school graduate, who completed a two-year course in automotive and diesel technology at UTI Institute in Chicago (I 9). He testified that he had been an auto mechanic for most of his adult life, and was certified by the State of Michigan in engine repair, auto brakes, and air conditioning (I 9). He was not a certified diagnostic technician (II 11-12).

Plaintiff was hired by defendant Auto Lab Diagnostics & Tune Up Centers in August, 2001, as a technician (I 10; II 12). According to Randal Gable, 83% owner of defendant (II 5), plaintiff was hired to work on brakes, electrical problems, and under the car (II 11).

On October 24, 2001, the date of plaintiff's injury, he left work approximately two hours early, to get ready for the first evening of a two-night auto repair seminar in Grand Rapids (I 17-18,21). He testified that his boss, Randy Gable, offered him the opportunity to attend (I 18). The course concerned the OBD-II system, software used on an on-board diagnostic scanner to pinpoint engine problems (I 18-19).

According to Brian Booher, another co-employee who received the same offer, Mr. Gable said, "There's a seminar on OBD2. It's a good course. If you guys want to go, you can go. You know, I'm not forcing you to go, but if you want to go, you can go to it" (B 21). Both plaintiff (I 45) and Mr. Booher (II 38,62) agreed that they could have declined to attend the seminar without consequences. Plaintiff stated that he would not have been

fired or otherwise disciplined if he had not attended, and did not consider attendance a condition of his employment with defendant (I 46).

Mr. Gable testified that he actually first offered the seminar spots to his two lead technicians, but both declined (II 7). Since Mr. Gable had credit with the company that put on the seminars that he wished to use up, Mr. Gable then offered the spots to plaintiff and Mr. Booher (II 7,11).

Mr. Gable testified that he would not have benefitted from plaintiff's attendance, since he was not a diagnostic technician and would not have done such work even if he had completed the seminar (II 11-12,28). Furthermore, plaintiff was a probationary employee in his first 90 days of employment, and it was not known if he would even be staying with the company at that point (II 11). There might have been some benefit to Mr. Booher's attendance, since he was at least certified in diagnostics, and plaintiff was simply allowed to go with him (II 33-34).

Plaintiff, however, testified that he would have become more efficient and accurate with such training (I 36). He offered somewhat inconsistent testimony as to whether he had actually used the scanner in question while employed by defendant (I 21,76; II 106).

In any event, Mr. Gable stated, there were to be no ramifications if plaintiff or Mr. Booher declined to attend, nor was there any pressure brought to bear on them to attend (II 9,10-11). Mr. Gable did not expect or compel attendance, but merely offered it if the employees wished to go (II 10). They were not specifically paid for attending, or for their time traveling back and forth (II 10).

Part owner Tim Hammock also testified that attendance was not mandatory (I 85-86). He provided Mr. Booher with gas and food money to go to the seminar, after being told by Mr. Booher just prior to departing that he had no money (I 84-85). In fact, plaintiff testified that he was not offered any such money as an inducement to attend, and in fact was never given any money and did not know Mr. Booher was given any (I 47-48).

While plaintiff and Mr. Booher were driving to the first night of the seminar, on October 24, 2001, they were involved in an automobile accident which resulted in significant injuries to plaintiff.

In a decision mailed from the Bureau on December 8, 2003, Magistrate Kenneth L. Block found that plaintiff's injuries arose out of and in the course of his employment with defendant. Although he found that defendant did not require plaintiff's attendance at the seminar, the magistrate found that it would have directly benefitted from said attendance. As a result, plaintiff was granted an open award of benefits. In addition, plaintiff was found to be totally and permanently disabled, and the Second Injury Fund was found responsible for differential benefits.

Intervening plaintiff Auto-Owners was held entitled to reimbursement where its payments of either weekly wage loss benefits or medical expenses duplicated plaintiff's workers' compensation entitlement. In addition, defendant was ordered to pay plaintiff's counsel an attorney fee on both weekly wage loss benefits and medical expenses granted plaintiff, including amounts reimbursed to Auto-Owners.

Appeals were filed by plaintiff, defendant, and Auto-Owners. In an order and opinion dated August 20, 2004, the Workers' Compensation Appellate Commission ["WCAC"] affirmed the magistrate's decision, modifying it only to deny plaintiff's counsel a fee from defendant on weekly wage loss benefits.

Believing that plaintiff's injury was inappropriately found to have arisen out of and in the course of his employment, attorney fees were improperly imposed upon defendant, and the WCAC failed to properly analyze this matter where it offered any analysis at all, defendant now sought leave to appeal to the Court of Appeals, which was denied on February 22, 2005.

Defendant now seeks leave to appeal to this Honorable Court.

ARGUMENT I

THE WCAC IMPERMISSIBLY FOUND PLAINTIFF'S ATTENDANCE AT THE SEMINAR TO BE AN INCIDENT OF HIS EMPLOYMENT, WHERE SAID ATTENDANCE WAS FOUND TO BE ENCOURAGED AT BEST, AND NOT REQUIRED OR EXPECTED.

Standard of Review. This Court reviews findings of fact rendered by the WCAC solely to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999).

In Camburn v Northwest School District, 459 Mich 471; 592 NW2d 46 (1999), this Court considered a case very close factually to the instant one, in which a teacher was injured in a motor vehicle accident while traveling to a teaching seminar sponsored by the intermediate school district. The teacher was paid for her attendance, but that attendance was neither compulsory nor definitely urged or expected. In finding that the teacher's injuries did not arise out of and in the course of her employment, the Court set forth the controlling legal principles noting that, where attendance at a seminar was not compulsory, definitely urged, or expected, it was not an incident of employment:

> "In *Marcotte*, *supra* at 677, [the Court of Appeals] quoted with approval from § 27.31(c) of Professor Larson's treatise which now states in pertinent part:
>
> > "As to the attending of conventions, institutes, seminars, and trade expositions, compensability similarly turns on whether claimant's contract of employment contemplated attendance as an incident of his work. It is not enough that the employer would benefit indirectly through the employee's increased knowledge and experience. . . .

> "Employment connection may be supplied by varying degrees of employer encouragement or direction. The clearest case for coverage is that of a teacher who is directed to attend a teacher's institute. It is also sufficient if attendance, although not compulsory, is 'definitely urged' or 'expected,' but not if it is merely 'encouraged.' Connection with the employment may also be bolstered by the showing of a specific employer benefit, as distinguished from a vague and general benefit, as when the attendance of an automobile mechanic at an examination given by the manufacturer permitted the dealer to advertise 'factory-trained mechanic.' [1A Larson, Workmen's Compensation Law, pp 5-397 to 5-403.]
>
> "We note that in § 27.31(a) in his treatise Professor Larson summarizes a similar rule in cases when an employee is injured while undertaking educational or training programs to enhance the employee's own work proficiency.
>
> "We agree with the WCAC that the magistrate properly applied the law to the facts as found. Even if defendant was directly benefited by plaintiff's intent to attend the seminar, substantial evidence supports the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident of employment. Therefore, plaintiff's injury did not arise out of and in the course of her employment." Camburn, supra, at 477-478.

Significantly, the Court held that, even if the school district had directly benefited from the teacher's attendance at the seminar, it was not an incident of her employment because her attendance was "merely encouraged..." Id. This distinction, a legal rather than factual matter, was completely disregarded by the WCAC.

The magistrate referred to a "two-part test" from Camburn, but held in complete contravention of the holding in that case that, even where attendance was "at best" encouraged, the mere fact that the employer realized a direct benefit was sufficient to establish compensability:

> "*Camburn v North West School District*, 459 Mich 471, 475 (1999), primarily applied a two-part test in resolving seminar-traveling issues. Plaintiff's claim clearly fails to meet

> one part of this test, i.e., whether attendance was compulsory or, at least, definitely urged or expected as opposed to merely encouraged. The testimony of all witnesses established that attendance was not compulsory; at best, attendance was encouraged. But facts surrounding the second part of the *Camburn* test, i.e., whether the employer directly benefits by the employee's attendance, preponderate in plaintiff's favor – especially when considered in conjunction with closely related precedents that were referenced in the *Camburn* case. Those cases are *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444 (1982), *Thomas v Staff Builders Healthcare*, 168 Mich 127 (1988), *lv den*, and *Stark v L E Myers Co*, 58 Mich [App] 439 (1975)." Magistrate's Opinion, at 2-3.

This finding is obviously inconsistent with Camburn. The magistrate held that plaintiff's trip to the seminar was an incident of employment even where attendance was only encouraged, because the employer derived a benefit. Camburn, however, required the denial of benefits in precisely that situation:

> "Even if defendant was directly benefited by plaintiff's intent to attend the seminar, substantial evidence supports the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident of employment. Therefore, plaintiff's injury did not arise out of and in the course of her employment." Camburn, supra, at 478.

The conflict is obvious.

However, the WCAC failed to either acknowledge the conflict or to resolve it. Instead, its extremely limited analysis on the subject actually failed to even mention Camburn:

> "We are impressed by the fact that *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444 (1982) remains a viable decision, making this case compensable. Also, see our decision in *Reiniche v Wal Mart Stores, Inc*, 2001 ACO 64, where claimant was neither required nor urged to participate in a parade, our Commission found compensability for plaintiff's injury when she sustained an injury falling off a float because the employer derived a direct benefit from the claimant's participation in the parade. Predicated on the magistrate's record supported fact finding in this case, *Reiniche* is on all fours with this case." WCAC's Opinion, at 10.

It is obviously absurd that the WCAC decided the issue of whether an accident which occurred in the course of travel to a seminar without citing to the leading case on the subject. Instead, the WCAC chose to rely upon a different case, Bush v Parmenter, Forsythe, Rude & Dethmers, 413 Mich 444; 320 NW2d 858 (1982), that came before Camburn and was obviously affected thereby, as well as one of its own opinions.[1] In effect, the WCAC proceeded as if Camburn had never been released at all.

It will undoubtedly be argued by plaintiff and intervening plaintiff that the Camburn Court approved an "alternative analysis." This is an attempt to subtly suggest that Camburn may be ignored. Clearly, it may not.

The Camburn analysis was premised by a confirmation that the claimant still needed to demonstrate that his or her activity at the time of injury was an incident of employment, which required satisfaction of the same test noted above:

> "Although plaintiff argues that she was on a special mission for her employer, the magistrate's findings support a contrary conclusion. The magistrate found defendant was not directly benefited by plaintiff's attendance at the seminar and that the attendance was neither compulsory nor definitely expected. Moreover, even if plaintiff's attendance at the seminar had been an incident of employment, her injury on the way to the seminar would not be compensable. In *Bush, supra* at 452, the Supreme Court quoted with approval the following from Professor Larson's treatise..." Camburn, supra, at 479.

Clearly, the so-called "alternative analysis" is not to be considered, unless it is first established that attendance at the seminar in question is an incident of employment. If the seminar was not work-related, the trip there clearly was not either.

Furthermore, this is a question of law, not fact. The magistrate himself found that plaintiff's attendance at the seminar was, "at best," "encouraged." Magistrate's Opinion,

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[1]Plaintiff or intervening plaintiff may note that the magistrate reprinted a lengthy portion of intervening plaintiff's brief, suggesting that Camburn permitted an award. However, the magistrate also included an excerpt from defendant's brief, contending that it did not. At the least, the WCAC was obliged to resolve this conflict. Instead, its analysis was basically a nonanalysis, dodging altogether the impact of Camburn on this matter. This cannot possibly be an adequate disposition of this case.

at 2. The WCAC affirmed this analysis. WCAC's Opinion, at 9. The application of the legal principles of Camburn require a finding of noncompensability given this factual finding:

> "Even if defendant was directly benefited by plaintiff's intent to attend the seminar, substantial evidence supports the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident of employment. Therefore, plaintiff's injury did not arise out of and in the course of her employment." Camburn, supra, at 478.

This undeniable legal principle requires a finding that plaintiff's injury was not compensable, as a matter of law. The WCAC's analysis, or rather its lack of analysis, clearly erred in concluding otherwise.

Leave to appeal should be granted to correct that error.

ARGUMENT II

IF PLAINTIFF HAS SUFFERED A WORK-RELATED INJURY, THIS COURT SHOULD FURTHER EXPLORE DEFENDANT'S LIABILITY FOR AN ATTORNEY FEE ON MEDICAL EXPENSES, IN THAT THE WCAC FAILED TO CONSIDER OR RESOLVE ISSUES DULY RAISED BEFORE IT IN THAT REGARD.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999).

As noted above, defendant does not believe that it is liable for benefits in this case. Should this Court agree, it may simply reverse the WCAC's decision in its entirety. This

argument would become moot, because there would be no benefits upon which to impose an attorney fee. There is, however, clearly a need for further consideration of this issue, if an award is granted.

Plaintiff's attorney was granted a fee on medical expenses found to be defendant's liability, including amounts reimbursed to intervening plaintiff Auto Owners, purportedly in accordance with the following language from MCL 418.315(1):

> "If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee."

The Court of Appeals has acknowledged that this language may permit the assessment of an attorney fee against a defendant. See, *e.g.*, Boyce v Grand Rapids Paving, 117 Mich App 546; 324 NW2d 28 (1982); Watkins v Chrysler Corp, 167 Mich App 122; 421 NW2d 597 (1988); Nezdropa v Wayne County, 152 Mich App 451; 394 NW2d 440 (1986). However, defendant submits that this is not a correct reading of the language in question.

In that regard, defendant would direct this Court to Commissioner Leslie's dissenting opinion in Stankovic v Kasle Steel Corp, 2000 ACO #124, which reads in pertinent part as follows:

> "I agree with the result reached by my colleagues in this case. Under the longstanding interpretation of MCL 418.315(1) by both the Commission and the Court of Appeals, the result is correct. However my reading of the statute leads me to the conclusion that this interpretation is completely wrong. I write separately because I believe that the issue should be revisited by the appellate courts.
>
> "The relevant portion of Section 315(1) reads:
>
> > "If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the hearing referee or

> worker's compensation magistrate, as applicable. The hearing referee or worker's compensation magistrate, as applicable, may prorate attorney fees at the contingent fee rate paid by the employee.

"I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer. The last sentence which permits the proration of attorney fees relates to the next to last sentence. That sentence states that reimbursement for medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.

"Although there may be valid reasons for the legislature to impose fees on the employer, I cannot see in the wording of section 315(1) that they did so. I am confirmed in this view by reviewing the history of section 315(1).

"Prior to May 15, 1963, the last portion of this section read:

> "If the employer shall fail, neglect or refuse so to do [pay medical benefits specified earlier in the section] such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the Commission. (Emphasis added)

"This language only allowed for payment of the reasonable medical expense to the employee. Even in situations where the medical bill was, as yet, unpaid, the provider could not be reimbursed directly. In response, in 1963 the legislature amended this section to provide for direct payment to medical providers. The new language read:

> "If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense paid by him, or payment may be made in behalf of such employee to persons to whom such unpaid expenses may be owing, by an award of the commission. The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such

payments in the event of redemptions. (Emphasis added).

"Thus, when the legislature amended the statute to allow for direct payment to medical providers, it added the provision which is currently under consideration. The only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee.

"The error of interpreting section 315(1) began with the Court of Appeals' decision in *Boyce v Grand Rapids Paving*, 117 Mich App 546 (1982). In that decision the court summarily rejected the claim that the medical provider, a beneficiary of the efforts of plaintiff's attorney in obtaining a recovery, should share in the obligation to pay attorney fees. The court did so without reference to the language of the statute. Compounding its error, the court immediately turned to the employer, and created an obligation under section 315(1). Their strained reading required the employer, under certain circumstances, to pay an attorney fee over and above the amounts for reasonable and necessary medical treatment.

"However, the decision in *Boyce* on the employer's liability for attorney fees is obiter dictum because the court did not decide the case on that issue. In denying that a separate fee could be assessed against the employer, *Boyce* looked to then Bureau Rule 14, which governed attorney fees. At the time of Mr. Boyce's injury, this rule did not allow any attorney fee on the recovery of medical expenses. Because unpaid medical was not included in the amounts for which a fee could be charged, section 315(1), whatever its interpretation could not be the basis for requiring the employer to be responsible for any additional fee payment. Thus, the court's understanding of the meaning of the last sentence of this provision is without force of law.

"As a result, the court in *Boyce* got the interpretation of the statute exactly backwards. The statute does, in fact, create an obligation on the part of the provider to pay the portion of the attorney fee reflected in the amount of the bill which was recovered on its behalf. Had the court interpreted this section properly, then there never would have been any need to consider the obligation of the employer for payment of a separate fee.

"Six years after *Boyce* the court revisited the issue in *Watkins v Chrysler Corp*, 167 Mich App 122 (1988). At that time, Bureau Rule 14 had been modified to allow for an attorney fee on the payment of medical benefits. In reversing the Appeal Board's award of medical expenses, however, the court found that the medical expenses were not unpaid because the

> plaintiff's medical expenses had been paid by defendant's health and accident insurer. As a result, there was no extended discussion of *Boyce* or the statutory language.
>
> "Unfortunately, *Boyce* has also been uncritically followed in cases solely involving provider fees. In *Zeeland Hospital v Vander Wal*, 134 Mich App 815 (1984) and *Duran v Sollitt Construction*, 135 Mich App 610 (1984) the court held that medical providers are not liable for an attorney fee in the absence of a specific agreement with the plaintiff's attorney to do so. As in *Boyce*, neither of these cases considered the specific language of section 315(1) or its history. Had they done so, presumably they would have come to the correct conclusion that the legislature has imposed such a fee on those who receive the benefit of recovery.
>
> "I concur with the result reached by my colleagues because of the Court of Appeals' and Commission's longstanding and consistent, albeit erroneous, interpretation of section 315(1) on the question of employer attorney fees. I believe that this issue should be reconsidered by the Court of Appeals or Supreme Court to interpret this section of the act commensurate with its plain meaning. Section 315(1) imposes liability for a fee on plaintiff and the medical providers and not the employer." (footnotes omitted)

Defendant agrees that this is the only reasonable interpretation of the language upon which the fee award was based.[2] Consequently, any award of attorney fees against it should be reversed as a matter of statutory construction – a matter this Court considers *de novo*. DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000).

Even if a fee is permissible pursuant to MCL 418.315(1), the magistrate misapplied that statute, while the WCAC provided absolutely no analysis on the issue and utterly failed to resolve the issues raised before it.

The statute does not require an award of attorney fees on medical expenses, but instead states that "[t]he worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee." Id (emphasis supplied). The use of the word "may" in this provision indicates the magistrate had discretion in whether or not to impose

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[2]Defendant did not raise this issue below, as, just as noted in the Stankovic dissent, the WCAC panel was obliged to follow the Court of Appeals' prior opinions on the subject. Quite obviously, this Court is not so bound.

a fee. Kondzer v Wayne County Sheriff, 219 Mich App 632, 639; 558 NW2d 215 (1996). In that regard, the Court of Appeals has held that a fee is not appropriate where there is no neglect or breach of duty. Watkins v Chrysler Corp 167 Mich App 122, 131-132; 421 NW2d 597 (1988). The WCAC itself has also noted that the imposition of a fee is not automatic:

> "The Commission has held that this provision permits a magistrate to order defendants to pay 'for a maximum of 30 percent (the contingent fee rate paid by the plaintiff) of the total attorney fees assessed on the medical expenses.' *Sikkema v Taylor Carving, Inc*, 1992 ACO # 469. However, the entitlement to fees under this provision is by no means automatic in every case where medical benefits are awarded. *Burnett v St. Joseph Hospital*, 1992 ACO # 720. The awarding of the fee is a matter of discretion on the part of the magistrate, who 'may' prorate attorney fees, in the interests of justice, in cases where an employer or carrier has failed, neglected or refused to pay for medical services a claimant is clearly entitled to." Scheland v Jet Box Co, 1995 ACO #242 (emphasis supplied)

As this language makes clear, an award of attorney fees is only appropriate when the defendants have refused to pay for medical services the injured employee "is clearly entitled to." Here, plaintiff's entitlement was not so clear.

In the first place, it should be noted that plaintiff has not been without medical expense coverage. The bills to date have been paid by the no-fault carrier. As a consequence, this is not a matter in which defendant's conduct in any way jeopardized plaintiff's care or recovery, and defendant has agreed to reimburse Auto-Owners for any amounts for which it may ultimately be found liable.

Furthermore, defendant declined to pay expenses in this matter based upon what it continues to believe is a reasonable interpretation of this Court's opinion in Camburn v Northwest School District, 459 Mich 471; 592 NW2d 46 (1999). While the magistrate may have read Camburn differently, defendant firmly believes that its position was reasonable.

As a consequence, even if defendant's position is not ultimately adopted, plaintiff's entitlement to benefits was not previously clear, as required by Scheland. Instead,

defendant had a reasonable and rational basis to withhold medical expense payments, particularly where it knew that plaintiff's care was still being taken care of. That being so, no award of attorney fees against defendant was appropriate in this case.

Additionally, this Court should note that the statute provides as follows: "The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee." MCL 418.315(1). The WCAC has interpreted this language to mean that an employer may, at most, be assessed "a maximum of thirty percent (the contingent fee paid by the plaintiff) of the total attorney fees assessed on the medical expenses." Sikkema v Taylor Carving, Inc, 1992 ACO #469. See, also, Stankovic v Kasle Steel Corp, 2000 ACO #124. In other words, if a fee is assessed, it may be no more than 30% of the fee on the medical expenses, not 30% of the value of the medical expenses themselves.

Both of these issues, whether a fee is appropriate in the face of a legitimate dispute and whether a full 30% fee was appropriate, were duly briefed by defendant before the WCAC. However, its opinion completely failed to address or resolve either issue. Instead, it wrote solely as follows:

> "The issues pertaining to attorney fees can be dealt with in short order. Regarding the payment of attorney fees to plaintiff's attorney for reimbursement of medical are expenses the employer has such obligation pursuant to *Duran v Sollitt Construction Co*, 135 Mich App 610 (1984) and *Zeeland Community Hosp v Vanderwall* [sic], 134 Mich App 815 (1984). For Appellate Commission authority for this proposition see *Stankovic v Kasle Steel Corp*, 2000 ACO # 124 and *Sikkema v Taylor Carving Inc*, 1992 ACO 469." WCAC's Opinion, at 10.

Again, this analysis is completely deficient. It does not deal with whether the magistrate abused his discretion in granting a fee under the circumstances, nor does it consider whether the amount of the fee granted (30%) was appropriate.[3]

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[3]The WCAC did go on to determine whether a fee would also be payable on attendant care, if appropriate. However, no party disagreed that attendant care was a medical expense, so this resolution was unnecessary. Additionally, the magistrate did not expressly grant attendant care, so that this remains an open question for further resolution if the parties do not agree.

Clearly, further review of this matter is required – a review never undertaken by the WCAC. Leave to appeal should be granted towards that end.

RELIEF

WHEREFORE Defendants-Appellants AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and FARMERS INSURANCE EXCHANGE respectfully request that this Honorable Supreme Court grant their application for leave to appeal. Defendants further request any other relief to which they may be entitled.

Respectfully submitted,

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Dated: April 1, 2005